are not in harmony, but the holding in this case accords with the weight of authority. The tendency of judicial opinion is in the direction of recognizing streams as public highways even though they are susceptible of but a minimum of "floatability." Usually it is required that the floatage be a result of natural causes, at periods ordinarily recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway. *Thunder Bay Booming Co.* v. *Speechley,* 31 Mich. 336, 18 Am. Rep. 184; *Lewis* v. *Coffee County,* 77 Ala. 190; *Shaw* v. *Oswego Iron Co.,* 10 Oregon 371, 45 Am. Rep. 146. But it is not sufficient to impress navigable character upon a stream that there may be extraordinary times of transient freshets. *Little Rock etc. R. R. Co.* v. *Brooks,* 43 Am. Rep. 275. However, in *Commissioners* v. *Lumber Co.,* 116 N. C. 731, a stream was held to be floatable in which were shoals where the water was not deep enough to permit the passage of logs, but eight or ten times a year at *irregular intervals* the stream rose several feet, remaining at such height from 24 to 48 hours, during which time logs were carried over the shoals without artificial assistance. The true criterion seems to depend upon the usefulness of the stream to the population on its banks; the stream must be actually capable of some profitable use, and when it is so capable it not only becomes a highway in which the public has an easement, but is subjected to the incidents of such use. *Powell* v. *Springston Lumber Co.* (1906), — Idaho —, 88 Pac. Rep. 97; *Mitchell* v. *Lea Lumber Co.,* 86 Pac. 405; *Log Driving Co.* v. *Byron,* 63 Atl. 913. Such use is a limitation to which the individual must yield something of his absolute rights with respect to person and property in subordination to the rights of others.

REMANDING OF CAUSES—MANDAMUS TO COMPEL.—Wisner, a citizen of Michigan, commmenced an action against Beardsley, a citizen of Louisiana, in the State Circuit Court for St. Louis. The proper steps having been taken the case was removed to the United States Circuit Court for that district, whereupon a motion was filed by the plaintiff to have the case remanded, but the motion was overruled. Application was then made to the Supreme Court of the United States for a writ of mandamus or prohibition to be directed to the Federal Circuit Court that further proceedings there might be prevented. *Held,* that the writ of mandamus should issue. *Ex parte Abram C. Wisner,* 203 U. S. —, 27 Sup. Ct. Rep. 150.

In order that a cause may be removed from the State Court in which it is pending to the Federal Circuit Court for that district, it must appear that it is such a case as might have been originally brought in the Federal Court, Congress has enacted that in all actions of which the Federal Circuit Court has jurisdiction the action must be brought in the district of which the defendant is a resident, but when the parties are citizens of different districts, it may be brought either in the district of which the plaintiff or defendant is a resident. After determining that not only must the plaintiff or defendant be a resident of the district in which the action is brought, but also a citizen, except where both parties submit to the jurisdiction, and that in the principal case neither the plaintiff nor defendant was a citizen of Missouri and

that the plaintiff by moving to remand evidenced his refusal to consent to the jurisdiction, the court awarded the writ of mandamus and dismissed the writ of prohibition. The court disposes of this latter part of the case in one sentence, giving no reasons and citing no authority. It seems impossible to reconcile this decision with the conclusion of the court in *Ex parte Hoard,* 105 U. S. 578, 26 L. Ed. 1176. In that case the cause was removed to the Federal Court and motion made to remand the same, but refused. Thereupon application was made to the United States Supreme Court for a writ of mandamus to compel the remanding. The court held that the writ should not issue. In *Insurance Co.* v. *Comstock,* 16 Wall. 258, followed in *Railroad Co.* v. *Wiswell,* 23 Id. 507, it was held that if the Circuit Court of the United States *refused* to take jurisdiction of a cause properly removed, mandamus would be issued "to compel the Circuit Court to proceed to a final judgment or decree." See *Ex parte Bradstreet,* 7 Pet. 633. In rendering the opinion in the *Hoard* case, Mr. CH. J. WAITE distinguished those cases from the one then under consideration as follows: "An order remanding a cause is not a final judgment or decree, from which ordinarily an appeal or writ of error may be taken; and in *Ex parte Bradstreet* it was stated by Mr. CH. J. MARSHALL, as the reason for allowing the mandamus, 'that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the value of the matter in dispute exceeds the sum or value of two thousand dollars,' now, of course, five thousand. If the cause be retained, it may go to final judgment or decree and the reason assigned for the mandamus in the case of dismissal does not exist. * * * Jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded." In *In re Sherman,* 124 U. S. 364, 8 Sup. Ct. Rep. 505, 31 L. Ed., 423, the court refused to grant mandamus to compel the Circuit Court to set aside an order to remand, the writ having been applied for on the ground that the complaint upon which the petitioner relied as showing the grounds of removal was not before the court when the order to remand was made. The court was of the opinion that the matter was discretionary with the lower court whether it would allow a rehearing or not. The first impression might be that the case of *Virginia* v. *Paul,* 148 U. S. 107, 13 Sup. Ct. Rep. 536, 37 L. Ed. 386, is in conflict with the *Hoard* case, but a careful examination of that case shows that it went off on entirely different grounds. There Paul was arrested and while held pending a hearing by the magistrate, habeas corpus was sued out of the Federal District Court, which was granted, and the case ordered removed to the Circuit Court. The State then filed a motion to remand, and it having been refused, the Supreme Court was applied to for mandamus, the court granting the writ. But the grounds upon which the issuance of the writ was based were: (1) There had been no prosecution commenced, so there was nothing to be removed; and (2) the proper proceedings for removal were not taken, so there was nothing before the lower court. The following extract from the opinion of Mr. JUSTICE GRAY indicates another feature of the case and brings it within the general principle laid down in the *Hoard* case: "If the case should be allowed to proceed in the Circuit Court of the United

States, and should finally result in an acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment." The rule seems to be well settled that mandamus will be issued only when there is no other adequate remedy. As said by Mr. CH. JUSTICE WAITE in the *Hoard* case: "It is an elementary principle that a mandamus cannot be used to perform the office of an appeal or writ of error," citing *Ex parte Loring,* 94 U. S. 418. Possibly the basis of the decision in the principal case was that the remedy by writ of error or appeal would not be adequate. The case seems to be a radical departure from previous decisions and the hitherto supposed limits upon the use of the extraordinary writ of mandamus, and apparently denies the Circuit Court of the United States, a court of general jurisdiction, the power to decide for itself whether or not it has jurisdiction to try a cause properly brought before it.

SALES—CONDITIONAL SALES—ACCIDENTAL DESTRUCTION OF PROPERTY—ON WHOM LOSS FALLS.—Plaintiff company sold to defendant a gasoline engine upon condition that the title and right of possession should remain in the vendor until payment had been made in full by vendee, as specified in the contract. Before all the payments had become due the engine, while in the possession of the vendee but without fault on his part, was wrecked by fire. *Held,* that the destruction of the engine did not relieve the vendee from the obligation to pay in full. *Jessup et al.* v. *Fairbanks, Morse & Co.* (1906), — Ind. —, 78 N. E. Rep. 1050.

The case is of interest as seeming to lay down the startling rule that where goods are accidentally destroyed, the loss shall not fall upon him in whom the title is. The general rule under ordinary circumstances is that such loss is borne by the owner. ENG. AND AM. ENCYC. OF LAW, Vol. 21, p. 634; MECHEM, SALES (1901 Edition), Vol. I, p. 523; *Mill Co.* v. *Butler,* 109 Ga. 469; *Williams* v. *Allen,* 10 Humph. (Tenn.) 339; *Grant* v. *United States,* 7 Wall. 331; *Morey* v. *Medbury,* 10 Hun. 540; *Smith* v. *Barber,* 153 Ind. 322; *Allen* v. *Delano,* 55 Me. 113. There is hopeless conflict, however, on the question whether the same rule holds good in the case of a conditional sale where possession is given to the vendee but title remains in the vendor. Note in MICHIGAN LAW REVIEW, Vol. 3, p. 468, and cases cited. One view holds to the general principle that the loss follows the title and is to the effect that in cases of conditional contract to sell where no title passes until payment in full, the loss unless otherwise provided by the contract falls upon the party agreeing to sell. MECHEM, SALES (1901 Edition), Vol. I, p. 523; *Stone* v. *Waite,* 88 Ala. 599; *Neally* v. *Wilhelm* (Ia.), 61 Am. Dec. 118; *Pierce* v. *Cooley,* 56 Mich. 552. Under this holding, where goods have been destroyed before all the payments had become due and the vendor brought suit upon promissory notes of the vendee, the plea of failure of consideration has been held a good defense. *Cobb* v. *Tufts* (Texas), 2 Willson Civ. Cas. Ct. App., § 152; *Arthur & Co.* v. *Blackman,* 63 Fed. 536; *Ballard* v. *Burgett,* 40 N. Y. 314; BENJAMIN, SALES (4th Am. Edition), p. 399. These decisions are based upon the theory that since the goods have been destroyed the vendor cannot give the vendee title upon completion of the payments and